92-359

No. _____

FILED
AUG 11 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

—v.—

LEONARD ADAMS, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

Of Counsel:

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United States Constitution, amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

LEONARD ADAMS

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Thirty-Two Thousand Five Hundred Dollars ($32,500.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

GARLEN R. BURTON, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Twenty-Nine Thousand Five Hundred Dollars ($29,500.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

GEORGE R. CAMPBELL, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff George Campbell's compensatory damages were determined by the Jury to be Fifty-One Thousand Dollars ($15,000.00). The Court does hereby further find that the Plaintiff George Campbell had negotiated settlements in his case totalling Thirty-Nine Thousand Seventy-Five Dollars ($39,075.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the appropriate amount of set-offs from the

Fifty-One Thousand Dollars ($51,000.00) compensatory verdict shall be Thirty-Seven Thousand Three Hundred Fifty Dollars ($37,350.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Thirteen Thousand Six Hundred Fifty Dollars ($13,650.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the

Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Forty-Three Thousand Six Hundred Fifty Dollars ($43,650.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,400.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in

the sum of Eighteen Thousand Six Hundred Fifty Dollars ($18,650.00) prior to perfecting any appeal in this matter, plus an additional amount of $1,900.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease

and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

LESLIE B. CARR, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff Leslie B. Carr's compensatory damages were determined by the Jury to be Twenty-Eight Thousand Five Hundred Dollars ($28,500.00). The Court does hereby further find that the Plaintiff Leslie B. Carr had negotiated settlements in his case totalling Twenty-Eight Thousand Seventy-Five Dollars ($28,075.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the

Thirty-Eight Thousand Five Hundred Dollars ($38,500.00) compensatory verdict shall be Twenty-Eight Thousand Five Hundred Fifty Dollars ($28,500.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Two Thousand One Hundred Fifty Dollars ($2,150.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas

Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Two Thousand One Hundred Fifty Dollars ($32,150.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,300.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Seven Thousand One Hundred Fifty Dollars ($7,150.00.00) prior to perfecting any appeal in this matter, plus an additional amount of $7,200.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict dies not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies

constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

ARVILLE DALTON, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Twenty Thousand Dollars ($20,000.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five Thousand Dollars ($5,000.00) in punitive

and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forth with obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did

not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-831

JAMES R. DARRAH, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff James R. Darrah's compensatory damages were determined by the Jury to be Fifty-Nine Thousand Five Hundred Dollars ($59,500.00). The Court does hereby further find that the Plaintiff James Darrah had negotiated settlements in his case totalling Thirty-Eight Thousand Five Hundred Fifty Dollars ($38,550.00) prior to said verdict. The Court does in addition find that Three Thousand Six Hundred Dollars ($3,600.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the appropriate amount of set-offs from the

Fifty-Nine Thousand Five Hundred Dollars ($59,500.00) compensatory verdict shall be Thirty-Four Thousand Nine Hundred Fifty Dollars ($34,950.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Twenty-Four Thousand Five Hundred Fifty Dollars ($24,550.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the

Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Fifty-Four Thousand Five Hundred Fifty Dollars ($54,550.00) prior to perfecting any appeal in this matter, plus an additional amount of $5,500.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in

the sum of Twenty-Nine Thousand Five Hundred Fifty Dollars ($29,550.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease

and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

PAUL DUNN, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Thirty Thousand Seven Hundred Fifty Dollars ($30,750.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

WILLIAM M. GABBERT,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff William M. Gabbert's compensatory damages were determined by the Jury to be Thirty-Eight Thousand Dollars ($38,000.00). The Court does hereby further find that the Plaintiff William M. Gabbert had negotiated settlements in his case totalling Thirty-One Thousand Two Hundred Twenty-Five Dollars ($31,225.00) prior to said verdict. The Court does in addition find that Two Thousand Eight Hundred Seventy-Five Dollars ($2,875.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the

appropriate amount of set-offs from the Thirty-Eight Thousand Dollars ($38,000.00) compensatory verdict shall be Twenty-Eight Thousand Three Hundred Fifty Dollars ($28,350.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Nine Thousand Six Hundred Fifty Dollars ($9,650.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas

Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Nine Thousand Six Hundred Fifty Dollars ($39,650.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Fourteen Thousand Six Hundred Fifty Dollars ($14,650.00) prior to perfecting any appeal in this matter, plus an additional amount of $1,500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies

constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

GEORGE F. HOSCHAR, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff George Hoschar's compensatory damages were determined by the Jury to be One Hundred Seventy-Eight Thousand Nine Hundred Ninety Dollars ($178,990.00). The Court does hereby further find that the Plaintiff George Hoschar had negotiated settlements in his case totalling Seventy-Three Thousand Hundred Dollars ($73,300.00) prior to said verdict. The Court does in addition find that Four Thousand Eight Hundred Dollars ($4,800.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the

appropriate amount of set-offs from the One Hundred Seventy-Eight Thousand Nine Hundred Ninety Dollars ($178,990.00) compensatory verdict shall be Sixty-Eight Thousand Five Hundred Dollars ($68,500.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of One Hundred Ten Thousand Four Hundred Ninety Dollars ($110,490.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the

Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of One Hundred Forty Thousand Four Hundred Ninety Dollars ($140,490.00) prior to perfecting any appeal in this matter,

plus an additional amount of $15,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of One Hundred Fifteen Thousand Four Hundred Ninety Dollars ($115,490.00) prior to perfecting any appeal in this matter, plus an additional amount of $11,500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy.

The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-764

JAMES R. KIRK, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff James R. Kirk's compensatory damages were determined by the Jury to be Twenty-Nine Thousand Dollars ($29,000.00). The Court does hereby further find that the Plaintiff James R. Kirk had negotiated settlements in his case totalling Twenty-Seven Thousand Twenty-Five Dollars ($27,025.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the

Twenty-Nine Thousand Hundred Dollars ($29,000.00) compensatory verdict shall be Twenty-Five Thousand Three Hundred Dollars ($25,300.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Three Thousand Seven Hundred Dollars ($3,700.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the

Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Three Thousand Seven Hundred Dollars ($33,700.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,400.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in

the sum of Eight Thousand Seven Hundred Dollars ($8,700.00) prior to perfecting any appeal in this matter, plus an additional amount of $900.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease

and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning
Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

WILLIAM E. KITTLE, et al.,

Plaintiff,

v.
CIVIL ACTION NO.: 86-C-830

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff William E. Kittle's compensatory damages were determined by the Jury to be Fifty-Six Thousand Dollars ($56,000.00). The Court does hereby further find that the Plaintiff William E. Kittle had negotiated settlements in his case totalling Twenty-Four Thousand Eight Hundred Twenty-Five Dollars ($24,825.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the

Fifty-Six Thousand Dollars ($56,000.00) compensatory verdict shall be Twenty-Three Thousand One Hundred Dollars ($23,100.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Thirty-Two Thousand Nine Hundred Dollars ($32,900.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the

Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Sixty-Two Thousand Nine Hundred Dollars ($62,900.00) prior to perfecting any appeal in this matter, plus an additional amount of $6,300.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in

the sum of Thirty-Seven Thousand Nine Hundred Dollars ($37,900.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,800.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease

and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-833

FOSTER A. LIPSCOMB, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Thirty-Five Thousand Five Hundred Dollars ($35,500.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-763

NELSON E. LOTT , et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff Nelson E. Lott's compensatory damages were determined by the Jury to be Seventy-Eight Thousand Six Hundred Dollars ($78,600.00). The Court does hereby further find that the Plaintiff Nelson E. Lott had negotiated settlements in his case totalling Thirty-Seven Thousand Twenty Hundred Dollars ($37,200.00) prior to said verdict. The Court does in addition find that Three Thousand Three Hundred Dollars ($3,300.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the appropriate amount of set-offs from the

Seventy-Eight Thousand Six Hundred Dollars ($78,600.00) compensatory verdict shall be Thirty-Three Thousand Nine Hundred Dollars ($33,900.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Forty-Four Thousand Seven Hundred Dollars ($44,700.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas

Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Seventy-Four Thousand Seven Hundred Dollars ($74,700.00) prior to perfecting any appeal in this matter, plus an additional amount of $7,500.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Forty-Nine Thousand Seven Hundred Dollars ($49,700.00) prior to perfecting any appeal in this matter, plus an additional amount of $5,000.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict dies not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies

constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 87-C-7

GEORGE V. MEHALIC, JR. et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff George V. Mehalic's compensatory damages were determined by the Jury to be Thirty-Nine Thousand Dollars ($39,000.00). The Court does hereby further find that the Plaintiff George V. Mehalic had negotiated settlements in his case totalling Twenty-Six Thousand One Hundred Twenty-Five Dollars ($26,175.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the appropriate amount of set-offs from the

Thirty-Nine Thousand Dollars ($39,000.00) compensatory verdict shall be Twenty-Four Thousand Four Hundred Fifty Dollars ($24,450.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the

legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Forty-Four Thousand Five Hundred Fifty Dollars ($44,550.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,500.00 Dollars.

Keene Corporation is hereby ORDERED to forth with obtain a bond in the sum of Nineteen Thousand Five Hundred Fifty Dollars ($19,550.00) prior to perfecting any appeal in this matter, plus an additional amount of $2,000.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural

disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ iilegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-763

JERYL C. ROOT, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff Jeryl C. Root's compensatory damages were determined by the Jury to be Thirty-Eight Thousand Five Hundred Dollars ($38,500.00). The Court does hereby further find that the Plaintiff Jeryl C. Root had negotiated settlements in his case totalling Thirty-One Thousand Four Hundred Seventy-Five Dollars ($31,475.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court dies hereby HOLD and ORDER that the

appropriate amount of set-offs from the Thirty-Eight Thousand Five Hundred Dollars ($38,500.00) compensatory verdict shall be Twenty-Nine Thousand Seven Hundred Fifty Dollars ($29,750.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

The only defendants against whom Plaintiff was awarded a verdict both jointly and severally was the Defendants Owens-Corning Fiberglas Corporation is therefore ORDERED to pay unto the Plaintiff both jointly and severally the sum of Eight Thousand Seven Hundred Fifty Dollars ($8,750.00) plus interest thereon from the date of the jury verdict on November 14, 1990, until paid.

In addition to the jury's verdict in the above-styled action, the

Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty-Eight Thousand Seven Hundred Fifty Dollars ($38,750.00) prior to perfecting any appeal in this matter,

plus an additional amount of $4,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirteen Thousand Seven Hundred Fifty Dollars ($13,750.00) prior to perfecting any appeal in this matter, plus an additional amount of $1,400.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict dies not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy.

The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-782

STANLEY E. ROWE, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby find that the compensatory damages awarded to the plaintiff of Fifteen Thousand Five Hundred Dollars ($15, 000.00) have been fully satisfied as a result of pre-trial settlements.

The Court does hereby HOLD and ORDER that the Defendants Keene Corporation and Owens-Corning Fiberglas shall pay no monies to the plaintiff as compensatory damages. However, pursuant to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages and the Defendant Keene Corporation is ordered to pay the plaintiff the sum of Five

Thousand Dollars ($5,000.00) in punitive and exemplary damages. Such punitive and exemplary damage awards shall in addition thereto include interest as of the date of the jury verdict at the legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Thirty Thousand Dollars ($30,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $3,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Five Thousand Dollars ($5,000.00) prior to perfecting any appeal in this matter, plus an additional amount of $500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis, including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/illegible
Counsel for Plaintiff

Counsel for Owens-Corning
Fiberglas Corporation

Counsel for Keene Corporation

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 86-C-832

JOSEPH L. SEBERNA, et al.,

Plaintiff,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.

Defendants.

JUDGEMENT ORDER

BE IT REMEMBERED that on the 11th day of March, 1991, came the parties, by counsel, and did argue their motions for judgments notwithstanding the verdicts and for new trial based upon the verdicts entered against them by a petit jury of this Court on the 14th day of November, 1990.

The Court having maturely considered the same, does hereby HOLD and ORDER that all motions for judgments

notwithstanding the verdict and for new trials are hereby denied.

The Court does hereby further HOLD and ORDER that the Plaintiff Joseph L. Sberna's compensatory damages were determined by the Jury to be Thirty-Seven Thousand Dollars ($37,000.00). The Court does hereby further find that the Plaintiff Joseph L. Sberna had negotiated settlements in his case totalling Twenty-Eight Thousand Five Hundred Twenty-Five Dollars ($28,525.00) prior to said verdict. The Court does in addition find that One Thousand Seven Hundred Twenty-Five Dollars ($1,725.00) of these negotiated settlements is based upon a contingent and deferred payment and should therefore not be set off from the judgment at this time. The Court does hereby HOLD and ORDER that the appropriate amount of set-offs from the

Thirty-Seven Thousand Dollars ($37,000.00) compensatory verdict shall be Twenty-Six Thousand Eight Hundred Dollars ($26,800.00). Plaintiff shall assign rights to contingent and deferred payments to Defendants.

In addition to the jury's verdict in the above-styled action, the Defendant Owens-Corning Fiberglas Corporation is ordered to pay the Plaintiff the sum of Thirty Thousand Dollars ($30,000.00) as punitive and exemplary damages. The Defendant Keene Corporation is ordered to pay the Plaintiff the sum of Five Thousand Dollars ($5,000.00) as punitive and exemplary damages. Such punitive and exemplary damaged awards shall in addition thereto include interest as of the date of the jury verdict at the

legal rate of interest until such time as said judgments are paid.

Owens-Corning Fiberglas Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Forty Thousand Two Hundred Dollars ($40,200.00) prior to perfecting any appeal in this matter, plus an additional amount of $4,000.00 Dollars.

Keene Corporation is hereby ORDERED to forthwith obtain a bond in the sum of Fifteen Thousand Two Hundred Dollars ($15,200.00) prior to perfecting any appeal in this matter, plus an additional amount of $1,500.00 Dollars.

This Court previously having ruled that the cases listed herein did not involve claims for risk of subsequently developing cancer, but rather were claims for asbestos pleural disease and parenchymal asbestosis,

including fear of cancer, it is Ordered that the jury verdict and subsequent entry of judgment pursuant to said verdict does not extinguish any rights should the plaintiff subsequently develop an asbestos-related malignancy. The Court has specifically ruled that claims for asbestos-related malignancies constitute separate causes of actions from claims for asbestos pleural disease and parenchymal asbestosis and fear of cancer.

Costs are taxed against non-prevailing Defendants.

The Defendants object and except to all adverse rulings of the Court.

ENTERED under my hand this 11th day of March, 1991.

/s/LARRY V. STARCHER
JUDGE

APPROVED AS TO FORM ONLY:

/s/ illegible
Counsel for Plaintiff

Counsel for Owens-Corning Fiberglas Corporation

Counsel for Keene Corporation

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of May, 1992, the following order was made and entered:

Leonard Adams, et al., Plaintiff Below, Respondents

vs.) No. 912484

Keene Corporation, et al., Defendants Below

Keene Corporation, Defendant Below, Petitioner

On a former day, to-wit, September 18, 1991, came the petitioner, Keene Corporation, by Spilman, Thomas, Battle & Klostermeyer, David K. Hendrickson and R. Scott Long, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Monongalia County, rendered on the 11th day of March, 1991, with the record therein accompanying the petition.

Thereafter, on the 23rd day of January, 1992, came the respondents by Hostler & Segal, and Scott S. Segal, and Henderson & Goldberg, and Theodore Goldberg, their attorneys, and presented to the Court their written response in opposition thereto. Finally, on the 27th day of February, 1992, came the respondents by Hostler & Segal, and Scott S. Segal, and Henderson & Goldberg, and Theodore Goldberg, their attorneys, and presented to the Court their written supplemental response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

Justice Brotherton would grant.

A True Copy

Attest: /s/ illegible

Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

IN RE: PERSONAL INJURY ASBESTOS CASES
(October 15, 1990 Trial Group)

CIVIL ACTION NO. 86-C-764

LEONARD ADAMS, et al.,

Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES,
a Pennsylvania Corporation,
et al.,

Defendants.

MOTION TO STRIKE PUNITIVE DAMAGES

Now come the defendants, Owens-Illinois, Inc., Pittsburgh Corning Corporation, Fibreboard Corporation and Keene Corporation, by and through counsel, and would move for the Court to strike the issue of punitive damages from this trial due to the following reason:

1. The imposition of punitive damages in the context of a mass tort litigation subjects the petitioner to a multiple punitive damage award for the same conduct and constitutes an excessive fine in violation of the Fifth and Eighth Amendments to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

Therefore, these defendants would move for the Court to strike the issue of punitive damages from this trial.

OWENS-ILLINOIS, INC.,
PITTSBURGH CORNING CORPORATION
FIBREBOARD CORPORATION AND
KEENE CORPORATION

By SPILMAN, THOMAS, BATTLE
& KLOSTERMEYER

/s/ illegible
David K. Hendrickson
Eric M. James
Post Office Box 273
Charleston, West Virginia 25321

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

IN RE: PERSONAL INJURY ASBESTOS CASES
(October 15,1990 Trial Group)

CIVIL ACTION NO. 86-C-764 et seq.

LEONARD ADAMS, et al.,

Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES,
a Pennsylvania Corporation,
et al.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION
TO STRIKE PUNITIVE DAMAGES

ARGUMENT

I. INTRODUCTION

II. PUNITIVE DAMAGES SHOULD NOT BE ALLOWED IN MULTI- PLAINTIFFS PRODUCTS LIABILITY LITIGATION.

III. AWARDS OF PUNITIVE DAMAGES IN A MULTITUDE OF SIMILAR SUITS FOR A SINGLE ACT SUBJECTS THE DEFENDANT TO DOUBLE JEOPARDY.

IV. THE STANDARD FOR AWARDING PUNITIVE DAMAGE IS SO VAGUE AS TO DENY DEFENDANTS' RIGHT TO DUE PROCESS.

V. REPETITIVE PUNITIVE DAMAGE AWARDS THROUGHOUT THE COUNTRY AMOUNT TO UNCONSTITUTIONALLY "EXCESSIVE FINES" IN VIOLATION OF THE EIGHTH AMENDMENT.

VI. THE DEFENDANTS' DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE 3, SECTION 10 AND SECTION 17 OF THE WEST VIRGINIA CONSTITUTION ARE VIOLATED BY PERMITTING MULTIPLE PUNITIVE DAMAGE VERDICTS AND BY REQUIRING A SEPARATE LIABILITY JURY TO ASSESS A MULTIPLIER-WITHOUT ALL THE EVIDENCE, WITHOUT ANY GUIDELINE AS TO WHAT A FAIR MULTIPLIER MIGHT BE.

VII. CONCLUSION.

I.

ARGUMENT

The above-captioned action contains claims for damages for personal injuries allegedly caused by the acts and/or omissions of defendants with regard to the manufacture and distribution of asbestos-containing products. Plaintiffs also claim entitlement to punitive damages. The defendants maintain that the plaintiffs' claim for punitive damages should be dismissed in accordance with public policy and the United States Constitution.

In the last decade the American Judicial System has encountered an unprecedented proliferation of asbestos product liability litigation. More than 40,000 claimants have already filed personal injury suits and 1000 additional suits are filed each month.

Kakalik, Ebener, Felsteiner, Haggestrom & Shanley, Costs of Asbestos Litigation, 12 (Institute for Civil Justice, Rand Corp. 1984). Not to mention the staggering property damage lawsuits being filed each day against the same defendants. It is unquestionably the most extensive and expensive litigation in history. The number of American workers who have developed or will develop diseases related to their exposure to asbestos is of unprecedented proportion with no end in sight.

Aside from seeking compensatory awards, the multitude of individual plaintiffs look for punitive damages. The enduring nature of this litigation into the foreseeable future raises constitution issues unique to the asbestos litigation. The time is ripe for reasserting the case against

punitive damages in the asbestos litigation. The defendants assert that punitive damages are inconsistent with the policy goals of strict liability; in addition, the defendants submit that continued awards of punitive damages on this extensive scale is in violation of the U.S. Constitution in the following ways. Punitive damage claims in this litigation have raised the spectre (sic) of repeated and excessive punitive damage awards for a single course of tortuous conduct in violation of the 5th Amendment double jeopardy clause. In addition, the standard for awarding punitive damages in most jurisdictions is so vague as to deny defendants right to due process in violation of the 14th Amendment. Moreover, repetitive punitive damage awards for a single course of conduct may amount to an

unconstitutionally excessive fine in violation of the Eighth Amendment.

II. PUNITIVE DAMAGES ARE NOT APPROPRIATE IN MULTI-PLAINTIFF PRODUCTS LIABILITY LITIGATION.

A. Public Policy Dictates a Dismissal of the Punitive Damages Claim.

The law of punitive damages evolved as a mechanism for civil punishment and deterrence: Traditionally, punitive damages were assessed against individuals who had committed an intentional tort or engaged in criminal behavior. Generally, punitive damages were a one time award for a one time violation. Within the last decade courts have been permitting imposition of punitive damages against sellers of defective products where the underlying claim for compensatory damages is negligence or strict liability. Many

commentators have argued and courts have agreed that the punitive damage awards are incompatible with strict liability claims because the former is solely concerned with the conduct of the defendant while the latter focuses on the condition of the product regardless of fault. See Meyers & Bairus, Punitive Damages in Product Liability Cases: A Survey, 51 Ins. Couns. J. 212, 213-16 (1984).

The first major attack on punitive damage claims in multiple product liability cases came from Judge Friendly of the Second Circuit in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, (1967) (the first appellate opinion to arise out of the anti-cholesterol drug sold under the trade name MER/29). Judge Friendly offered powerful policy arguments against awarding punitive

damages against manufacturers in product liability cases. In Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2nd Cir. 1967), Judge Friendly articulated the dangers of uncontrolled punitive recoveries in the hundreds of suits pending in different jurisdictions against the manufacturer of MER/29, stating:

> If all recovered punitive damages in the amount here awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of "imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine", 21 U.S.C. § 333(b), for each violation of the Food, Drug and Cosmetic Act with intent to defraud or mislead. We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill. 378 F.2d at 839. (Emphasis added, footnote omitted.)

Judge Friendly also observed that multiple awards eventually jeopardize a

manufacturer's very existence, the ultimate penalty falling on the innocent stockholders of the defendant corporation, the employees, the general public in the form of higher consumer prices.

As stated in Roginsky:

> [T]he apparent impracticality of imposing an effective ceiling on punitive awards in hundreds of suits in different courts may result in an aggregate which, when piled on large compensatory damages, could reach catastrophic amounts. If liability policies can protect against this risk as several courts have held, the cost of providing this probably needless deterrence, not only to the few manufacturers from whom punitive damages for highly negligent conduct are sought but to the thousands from whom it never will be, is passed on to the consuming pubic; if they cannot, as is held by other courts and recommended by most commentators, a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their

> investment for a single management sin. Id. at 841.

Judge Friendly's analysis has received widespread support in the asbestos litigation and several courts have dismissed punitive damage claims on the grounds that they are inappropriate in multiple-plaintiff product liability actions.

The Federal Court in Connecticut dismissed punitive damage claims relying on Judge Friendly's decision in Roginsky, supra. In his ruling in LaBrecque v. Johns-Manville, transcript at 2356-2362 (1982), Judge Blumenfeld echoed Judge Friendly's views.

> "I don't think that this doctrine of punitive damages is appropriate in such a case. Judge Friendly discusses the problem and takes that view also -- or takes that view, and I am impressed by it, and I think its a factor which I am using to support my opinion here, my decision."

> So, I mean, it's not just this case, it's hundreds of other cases, and I don't think punitive damages are designed to be given to one plaintiff or each one of hundreds of plaintiffs in order to punish a defendant for one course of conduct.

Id., transcript at 2359.

In Erwin v. Johns-Manville Sales Corp., et al., No. C-3533 (Tenn. Cir. Ct. Jan. 1982), the Tennessee Circuit Court held that, in every asbestos case before the Court, punitive damages would not be considered at trial as a matter of law:

> It is the opinion of this court that in multiple plaintiff products liability actions the large number of actions and potential compensatory awards serve a sufficient punishment and deterrence and hence an award of punitive damages is unwarranted.

Similarly, in Sanford v. The Celotex Corp., No. 3-84-0698 (M.D. Tenn. Oct.e3, 1984) (a copy of which is attached), the Court stated, "[T]he unique nature of

asbestos litigation necessitates care not to exhaust in a limited number of large punitive damage awards funds needed for possible compensatory awards in multiple asbestos lawsuits." Id., slip op. at 4.

As this Court is aware, the same defendants face multiple exposure from tens of thousands of asbestos workers across the country in one of the most infamous series of cases in history. The magnitude of the liability encountered by the defendants in the asbestos litigation is without precedent and foreseeable dimension. Over one billion dollars has been expended by the asbestos industry to date in asbestos-related litigation. Kakalik, Ebener, Felsteiner, Haggestrom & Shanley, Variation in Asbestos Litigation Compensation and Expenses.

(Institute for Civil Justice, Rand Corp. 1984).

The policy justifications for punitive damages is punishment and deterrence of future conduct of a similar nature. It is manifestly apparent, however, that both objectives are amply achieved in the context of these cases without the imposition of punitive awards. The combined effect of multiple compensatory damage awards throughout the country has been staggering and easily fulfills the goal of punishment.

The objective of deterrence is more than adequately served as to the defendants through the tens of thousands of claims filed and to be filed for compensatory damages. The present behavior of defendants would not be altered by the award of punitive damages

since they no longer manufacturer or distribute asbestos products. Furthermore, the plaintiffs' claims of punitive damages relate to allegations of conduct which occurred fifteen to forty years ago when these defendants had different officers and different boards of directors. No deterrent impact will be realized under these circumstances, and the recovery of such damages, even if warranted, would serve only to punish defendants time and time again for alleged past behavior, contrary to the purposes of exemplary or punitive damages. The massive exposure to compensatory damages facing the defendants stands as a formidable deterrent.

Furthermore, the overall objectives of the tort system -- that is full and fair compensation to persons injured

through the fault of another - are ill-served by permitting punitive damage awards which will ultimately deplete the resources available to compensate future claimants. See, In re Related Asbestos Cases, 566 F. Supp. 818,822 (N.D. Cal. 1983) (corporation's assets "could arguably suffer such serious depletion as a result of punitive damage suits, that the corporation would be unable to provide compensatory damages to future plaintiffs genuinely in need of monetary recovery"); Globus v. Law Research Service, Inc., 418 F.2d 1276 (2nd Cir. 1969), cert. denied, 397 U.S. 913 (1970) (initial punitive damage award might exhaust funds for compensation of later litigants and was therefore eliminated). Additional punitive damages serve only to award the present plaintiffs a windfall far in excess of equitable

compensation for their injuries, and to the detriment of future claimants.

Even if some beneficial punishing or deterring effect is obtained from punitive damage awards, such beneficial effects are more than outweighed by the negative policy effects of awarding punitive damages.

Moreover, the policy justifications for awarding punitive damages are destroyed in jurisdictions such as Texas where liability insurance may be available to defendants. Dairyland County Mutual Ins. Co. v. Wallgreen 447 S.W. 2d 341 (Tex. Civ. App. 1972).

Furthermore, punitive damages are inappropriate in lawsuits where defendants are held strictly liable for compensatory damages.

Strict liability in tort was conceived as a system in which

manufacturers could pass on to customers as a cost of doing business the injuries sustained from defective products. The policy justification is that the manufacturer is in a better position than the plaintiff to absorb the cost of the injuries. The manufacturer in turn passes it on to the consumer in higher prices. If it passes on the losses to the consuming public, the manufacturer is then placed at a competitive disadvantage with other manufacturers and faces a greater chance of business failure. Reduced competition in the market place leads to higher prices and less variety and quality of products. The public pays a social cost of business failures and bankruptcies in the form of less jobs and productivity in our economy. Thus the public ends up

punishing itself in higher prices by awarding punitive damages.

As Judge Friendly observed in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832,838-39 (2nd Cir. 1967), punitive damages developed in a context in which the number of plaintiffs suing on the basis of a wrongful act would be small and could be joined in a single trial. On the other hand, "the legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. Id. at 839. For the past decade the defendants have sought to compensate those legitimate claimants with asbestos-related injury. This focus will continue for years to come. Claims for punitive damages on the other hand threaten to put the defendants into financial ruin, and are blatantly inconsistent with the

goal of fair and just compensation for deserving claimants and their families.

Judge Friendly's greatest concerns are being realized in the asbestos litigation. The ultimate consequence of unrestrained potential liability has already become a partial reality. Johns-Manville, a defendant in almost every asbestos suit in the United States, filed a petition in bankruptcy in 1982. Johns-Manville was the most prominent defendant, ranking 191 among the 500 largest U.S. industrial corporations in 1982. Fortune (May 3, 1985). Several other major defendants have also filed petitions for bankruptcy and many others will be forced to seek bankruptcy protection if their liability remains open-ended as is with repetitive punitive damage exposure.

The Court must remain cognizant of the public policy interests in the asbestos litigation and the national concerns at stake. As the United States Government urged when it intervened as amicus curiae in the appeal of Jackson v. Johns-Manville, 781 F.2d 394 (5th Cir. 1986):

> "Awards of punitive damages [must] be carefully limited to minimize the possibility that some plaintiffs will be denied the ability to obtain compensation for their injuries because others have received awards beyond those designed to compensate for demonstrated injuries." pg. U.S. brief 2 & 3.
>
> In addition to the government's concern that all plaintiffs receive just compensation for their injuries, "the United States is concerned that the private resources involved in the litigation may be eroded, thus preventing full recovery by future plaintiffs and resort will ultimately be had to the public fisc in order to insure full justice for tort victims." Id. at pg. 5.
>
> As noted in the brief, "the taxpayer already bears a significant part of the cost of compensating asbestos

> victims - through various health and income maintenance programs such as Social Security disability, veterans' disability and health care benefits such as medicare/medicaid." Id.

Compensatory damages fully compensate a plaintiff for his injuries. After these injuries are compensated, his equities are not greater than the consumers, the innocent employees and stockholders of a manufacturer or the future claimants. Accordingly, public policy considerations strongly suggest that punitive damages awards should not be permitted in multi-plaintiff products liability cases.

The United States Supreme Court has endorsed the view that Courts should examine public policy interests before assessing punitive damages. The Supreme Court has held that punitive damages should be eliminated or restricted in circumstances where there are overriding

public policy concerns. See, e.g., City of Newport v. Fact Concerts. Inc., 453 U.S. 247,101 S.Ct. 2748 (1981); IBEW v. Foust, 442 U.S. 42 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323(1974). The Supreme Court applied a balancing test in the above cases assessing the potential benefits of a punitive damage award with the possible effects and economic consequences of allowing such awards. For example, in IBEW v. Foust, supra, the Supreme Court held that punitive damages should not be assessed against a labor union for unfair unrepresentation despite the benefits. The Supreme Court applying its balancing test held that:

> Such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends Upon the strength of their union, is simply

> too great a price for whatever deterrent effect punitive damages may have. Id. at 50.

Similarly, punitive damages have been denied for violations of certain provisions of the securities laws. See, e.g., deMaas v. Empire Petroleum Co., 418 F.2d 1276, 1285 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970); Green v. Wolf Corp., 406 F.2d 291, 303 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969).

The securities cases present identical issues as are confronted in the asbestos litigation, i.e., the inability to control the overall burden of punitive damages against a single defendant facing multiple lawsuits for the same course of conduct, and the potential for destruction of a viable corporation. Once again, in balancing the potential benefits of punitive

damages awards courts have found that their widespread economic detriment greatly outweighs the value of any surplus deterrence.

In deMaas v. Empire Petroleum Co., supra, the Court stated:

> In addition to the doubt as to whether punitive damages would significantly increase the deterrent power of securities law enforcement, we should also consider whether allowing such damages might create unwarranted problems and injustices. The Second Circuit has expressed concern that juries could award excessive punitive damages for a single transgression, which might severely injure or even bankrupt an otherwise honest defendant. See, Globus v. Law Research Service. Inc., 418 F.2d at 1285.
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> • • •
>
> It is also argued that punitive damages are inappropriate, at least as used against publicly owned corporations, because the burden would ultimately fall on innocent stockholders.
>
> A more serious hurdle than the above problems is how to control the overall burden of punitive damages against a single defendant for a

> securities fraud violation when claims may be brought in more than one court. If juries in several lawsuits are able to assess punitive damages against the same defendant for the same transaction, there is the danger of overkill.

When applying the Supreme Court's balancing test to the asbestos litigation, it is apparent that any benefit realized by punitive damage exposure in the context of these cases is clearly outweighed by the adverse consequences that would inevitably result.

In a number of cases around the country the trial judges have refused to submit punitive damage issues to the jury. Rimlinger v. Johns-Manville Sales Corp., No. C-6430 (Davidsen County, Tenn. Cir. Ct. Jan.e8, 1981); Labrecque v. Johns- Manville, et al., No. M-77-20 (D. Conn. 1982); Mogard v. Johns-Manville, No. C 137466, Cal. Sup.

Ct., County of Los Angeles (1980); Gill v. Pacor, Philadelphia, Ct. of Common Pleas, Nov. Term, 1977 No. 362 (order of Judge Takiff, August 13, 1982); Pilkington v. Combustion Engineering, Cir. Ct. Orange County, Florida No. 78-952 (Judge Gridley). Hesley v. Pittsburgh Corning Corp., State of Minnesota, District Court, Fourth Judicial District, #776306(1983).

In an earlier asbestos case the court held that "[P]resence alone or knowledge alone or involvement on an association basis without more or even possession of the knowledge without further evidence as to wantonness is insufficient to support the question of punitive damages being considered by the jury." Neal v. Carey Canadian Mines. Ltd., 548 F. Supp. 357,375 (E.D. Pa. 1982) (Punitive damage claims dismissed as to all asbestos

supplier defendants except Johns-Manville).

In all of the above cases, judges or juries have found that the extreme conduct required for a award of punitive damages coupled with the overriding policy concerns makes the award of punitive damages inappropriate in massive multi- plaintiff litigation.

B. The Fifth Circuit Court Decision in Jackson v. Johns-Manville. et al. is not Dispositive on This Issue.

The plaintiffs may argue that the recent Fifth Circuit Court decision in Jackson v. Johns-Manville, 781 F.2d 394 (C.A.5 1986), (en banc) (9 to 5) supports their claims for a punitive damage award. That decision, however, is expressly predicated on principals of

Mississippi law which have no application in West Virginia.

As stated by the Court:

> As a federal Court "it is not for us to adopt innovative theories of [state law), but simply to apply that law as it currently exists", Galindo v. Precision American Corp., 754 F.2d 1212, 1217 (5th Cir. 1985), and to rule as we believe the states highest tribunal would rule, Green, 617 F.2d at 214. We are emphatically not permitted to do merely what we think best; we must do that which we think the Mississippi Supreme Court would deem best. See, e.g. United States v. Little Joe Trawlers. Inc., 776 F.2d 1249, 1253 (5th Cir. 1985) (No. 84-2678 Nov. 19,1985) ("In our Erie role, we make no value judgments as to what [Mississippi) law out to be)). Id. at 397.

The Court made the point many times that its decision was based solely on Mississippi law.

> If the law of Mississippi is to be changed, "it is up to the Supreme Court of [Mississippi] and not this Court to change the substantive law of that state". Cargill. Inc. v. Offshore Logistics, Inc., 615 F.2d 212,215(5th Cir. 1980). Finally under ~ we cannot skirt the clear import of state decisional law solely because

the result is harsh. Parsons v. United States, 460 F3d 228,234(5th Cir. 1972).

The Court of Appeals followed Mississippi law but clearly did so reluctantly. The Court's apprehension in deciding on the appropriateness of awarding punitive damages was apparent throughout the proceedings of the case. In the first instance the Court of Appeals certified this issue to the Mississippi Supreme Court in order to establish the proper interpretation of the state tort law on punitive damages for this case. When the Mississippi Supreme Court refused to rule on the certified issues, the Court was left with the responsibility of deciding the issue of punitive damages on the basis of what it had already determined in choosing to certify was an inadequate legal foundation. Noting this burden the

majority emphasized that their decision was based on Mississippi law irrespective of whether they thought it provided the most reasoned analysis. See, Id. at p. 397.

In a strong dissent, in which five Circuit Judges joined, Chief Judge Clark declared that, "looking backward to the signposts of stare decisis has turned the Court away from the road to justice because this case exceeds the limits of ordinary case and controversy litigation in our complex, interrelated society". Id. at p. 415.

Chief Justice Clark went on to state that the decision was the "wrong response by the wrong Court". Id. at pp. 415-417. He argued it was the wrong response because the Court refused to consider the paramount public policy issues presented by the asbestos

litigation, such as providing "compensation to the majority rather than unjust and excessive rewards to the few". For example, Chief Justice Clark argued that the court should have considered the possibility that future litigants may be deprived of their just compensation. He also stated that the majority perceived the case as "one individual claim against some companies", instead of considering its potentially detrimental effect of denying relief to thousands of the future litigants.

Tens of thousands of similarly situated claimants are already seeking relief against the same defendants, and a legion of other potential plaintiffs stand in the wrings, awaiting the predictable manifestations of their identical exposure. Id. at p. 416.

Finally, Chief Justice Clark maintains that the correct Court to have decided this case was the Supreme Court of the United States.

The problems we face in this litigation are ones of national public policy. To respond to such policy is beyond ability of this diversity-bases (sic) court. Such policy cannot be subjected to the whims of individual states because matters of national public policy have nationwide application. Id. at p. 417.

Many courts have considered the public policy issues outlined by the dissent and have been persuaded by these public policy arguments. The Court should not be influenced by the majority in Jackson, but by the overriding public policy goals enumerated throughout this brief.

III. AWARDS OF PUNITIVE DAMAGES IN A MULTITUDE OF SIMILAR SUITS FOR A SINGLE ACT SUBJECTS THE DEFENDANT TO DOUBLE JEOPARDY.

The constitutional rights of a defendant are violated by the repeated awards of punitive damages in multi-plaintiff product liability suits. The imposition of unlimited punishment for a single act or unified course of conduct violates the Fifth Amendment guarantee against double jeopardy.

The double jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The requirements that one's "life and limb" must be twice put in jeopardy is no longer a requirement. Exparte Lange, 85 U.S. (18 Wall) 163, 169-75 (1873) (threat of death or mutilation

eliminated as requirement of double jeopardy).

The double jeopardy clause has evolved to "protect defendants against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 716, 89 S.Ct. 2072, 2076, 23 L. Ed. 2d 656(1969). The double jeopardy clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. Benten v. Maryland, 395 U.S. 784, 794 (1969).

Jeopardy refers to the risks that traditionally arise from a criminal prosecution. Breed v. Jones, 421 U.S. 519,529(1975). Labelling a suit "civil", however, is insufficient to deny application of the double jeopardy clause. Id. at 529. The test is whether the proceeding is essentially criminal. The primary consideration in

deciding whether an action is essentially criminal, is whether the legislature intended the provision to be punitive or remedial. See Melvering v. Mitchell, 303 U.S. 391, 397-98 (1938); United States v. Grunstein & Sons. Co., 127 F. Supp. 907,912 (D.NJ. 1955). Black's Law Dictionary (5th ed. 1979) defines a remedial action is one "which is brought to obtain compensation or indemnity". Id. at 1162. A punitive action, in contrast is defined as having "the character of punishment or penalty". Id. at 1110. In the majority of jurisdiction the goal of punitive damages is punishment. The award is given to the plaintiff in addition to the compensatory award for the injury. The magnitude of repetitive punitive damage awards in the asbestos litigation arguably meeting the Supreme Court's

criteria for protection under the Fifth Amendment.

From the early history of our nation courts have recognized the constitutional problems posed by an award of punitive damages. As early as 1884 courts were refuting the belief that the double jeopardy clause only referred to criminal offenses.

Courts attempted to explain away the apparent conflict with the constitutional inhibition above mentioned; they say that the language there used refers exclusively to criminal procedure, and cannot include civil actions. But this position amounts to a complete surrender of the evident spirit and intent of that instrument. When the convention framed and when the people adopted the constitution both understood the purpose

of this clause to be the prevention of double prosecutions for the same offense. Yet, under the rule allowing exemplary damages, not only may two prosecutions, but also two convictions and punishments, be had. What difference does it make to the accused, so far as this question is concerned, that one prosecution take the form of a civil action, in which he is called defendant? He is practically harassed with two prosecutions and subjected to two convictions; while no hypothesis, however ingenious can cloud in his mind the palpable fact that for the same tort he suffers two punishments [citation omitted]. Murphy v. Hobbs, 7 Colo. 541, 5 P. 119, 120 (1884).

More recently, the United States Supreme Court has considered the issue of whether the double jeopardy clause

applies exclusively to criminal proceeding and has held that a clear rule of distinction does not exist. In Kennedy v. Mandoze-Martinez, 372 U.S. 144,83 S.Ct. 554(1960) the Supreme Court held that labeling a offense civil or criminal could not avoid the necessary constitutional safeguards.

> Whether a sanction is "criminal" and thereby invokes the constitutional double jeopardy protection depends upon its underlying purpose regardless of its label.

In Kennedy, supra, the Supreme Court announced seven factors that should be considered in determining whether a sanction is punitive in nature.

> [w]hether the sanction involves a affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether a alternative purpose to

> which it may rationally be connected is excessive in relation to the alternative purpose assigned. Id. at 168-69 (footnotes omitted).

Each of those seven factors arguably exists in the asbestos litigation. Historically, punitive damages have been awarded as a form of punishment. As is the case with most forms of punishment a award of punitive damages requires a finding of scienter, that is that the defendant acted willfully, maliciously and/or wantonly. As previously discussed in detail the policy justification for punitive damages is punishment and deterrence. The factors enumerated by the Supreme Court in Kennedy, supra, confirm that punitive damages are in fact a quasi-criminal form of punishment and therefore should receive the constitutional protection guaranteed by the Fifth Amendment.

Double jeopardy problems are especially acute in multi-plaintiff liability litigation where the potential for being punished more than once is uncontrolled. As an expert on punitive damages has noted,

> [p]unitive damages for tortious conduct is the only area of law in America where one can be punished and deprived of one's property without clear guidelines or evidentiary safeguards of due process well known to all other forms of legal punishment. Ghiardi & Kircher, Punitive Damages Law and Practice, at § 6.06(1981).

Relying on the constitutional protection against double jeopardy, a number of courts have disallowed punitive damage awards in the asbestos litigation. In LaBrecque v. Johns-Manville Sales Corp., Civil Action No. H-77-201 (Feb. 1982); Morency v. Johns-Manville, Civil Action No. 77400 (May, 1983). The Honorable M.J.

Blumenfeld of the Federal District Court in Connecticut dismissed the claims for punitive damages in the above cases stating that the imposition of punitive damages throughout the country exposed the defendants to double jeopardy in violation of their constitutional rights.

> [T]he defendants are open to punishment by way of punitive damages even in jurisdictions which will not limit the amount as they do in Connecticut, in many states throughout the country, and in hundreds, maybe thousands of cases.
>
> Well, you might run into what Mr. Rottner yesterday said, that this would be cruel and unusual punishment, or might be double jeopardy if they're going to be punished in every case of every plaintiff, because there may be a thousand cases.

The Honorable Howard Vann, Circuit Court Judge in Hillsborough County, Florida ordered that punitive damages would not be allowed against defendants

who had been assessed punitive damages in prior asbestos cases.

Judge Van voiced his opposition to awarding punitive damages in multiple product liability cases.

> I am concerned very much about and I have stated for at least the past three years the question of punitive damages in mass marketing .....
>
> And, I have expressed my opposition to punitive ... to defendants being hit time and time again. And, I don't think that's the purpose of punitive damages.

Many courts throughout the country have begun to realize the impact of punitive damage awards on defendants in the asbestos litigation. The defendants in the above-captioned cases have paid out millions of punitive damage awards throughout the country and have in fact been assessed punitive damage in the Texas asbestos litigation. Further exposure to punitive damage awards in

the above-captioned cases places the defendants in a double jeopardy situation in violation of their Fifth Amendment rights.

The second purpose of the double jeopardy clause is to prevent punishment that is incommensurate with a defendant's level of culpability. The potential for punitive damage awards far in excess of the defendant's culpability in the asbestos litigation is a serious and real danger. Large assessments of punitive damages threaten the continued viability of most manufacturing concerns. The increasing number and size of such awards raise concern for the future stability of the defendants still remaining in the asbestos litigation. Numbers of companies have filed for bankruptcy. Johns-Manville, a defendant in almost every asbestos suit in the

United States, filed a petition in bankruptcy in 1982. Several other major and minor defendants have also filed petition for bankruptcy and many others will be forced to seek this protection if their liability remains open-ended as is with repetitive punitive damage exposure.

Additionally, most jurisdictions, including West Virginia, follow the rule of joint and several liability. Joint and several liability requires that each defendant who is found to have been a cause of the plaintiffs injuries shall be 'jointly and severally" liable for the entire amount that the plaintiff is entitled to recover, subject to a right of contribution for payments in excess of the defendant's percentage share. The existence of joint and several liability becomes important when one or more

defendants are insolvent. When a defendant is insolvent the goal of allocating the loss among those responsible cannot be achieved. Nevertheless, those defendants who remain solvent must compensate the plaintiff thereby imposing the risk of a insolvent defendant on the remaining defendants. This results in the solvent defendants paying more than their fair share of the compensatory damages. Therefore the solvent defendants have been paying a disproportionate amount of the compensatory damages in addition to the uncontrolled and repetitive punitive damage awards. This creates a situation where the punishment is not commensurate with the defendant's level of culpability and therefore violative of the defendant's Fifth Amendment rights.

Substantive constitutional issues are raised by subjecting a defendant to multiple awards in numerous, separate cases in different jurisdictions without any control over the number, size, or proportion of the awards. In that the defendants here have been subjected to punitive damages in numerous cases, including, but not limited to, Texas, further exposure puts the defendants in double jeopardy. In addition, the defendants have been punished with punitive damages in other cases and are continuing to be punished by the staggering amount of plaintiffs cases being filed each day. It has reached the point in the asbestos litigation where the punishment far outweighs the crime. Therefore, the claim for punitive damages in the instant case should be dismissed because it is & violation of

the double jeopardy clause of the Fifth Amendment.

IV. THE STANDARD FOR AWARDING PUNITIVE DAMAGE IS SO VAGUE AS TO DENY DEFENDANTS' RIGHT TO DUE PROCESS.

The United States Supreme Court has clearly established that the term "citizen" in the United States Constitution is to apply equally to corporations for purposes of the due process clause of the Fifth and Fourteenth Amendments. Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394(1886). The Fifth Amendment states that "no person shall be deprived of life, liberty or property without due process of law .6.6. U.S. Constit. Amend. V. Due Process is required in any legal proceeding by which a person may be deprived of life, liberty or

property. Shaffer v. Heitner, 433 U.S. 186 (1977). In reviewing a proceeding to determine its procedural fairness, courts review the system of decision-making to determine whether a person has been deprived of life, liberty or property without the fair procedure or due process required by the Fifth and Fourteenth Amendments.

Awards of punitive damages in the asbestos litigation are violative of due process in a number of ways. An award of punitive damages violates the due process clause because the standard for imposing such an award is unconstitutionally vague and arbitrary. Imposition of punishment, based on a vague and unclear standard is constitutionally prohibited:

> It is established that a law fails to meet the requirement of the Due Process Clause if it is so vague and

> standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. [citation omitted]

Giaccio v. State of Pennsylvania 382 U.S. 399, 402, 403 (1966).

The U.S. Supreme Court has held that the void for vagueness prohibition applies to any punishment, whether labeled penal or civil, which exact. . . ". . . obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." A.B. Small Company v. American Sugar Refining Co., 267 U.S. 233,239(1925). See, also, Giaccio v. State of Pennsylvania, supra.

The term punitive is vague and indefinite, the meaning and standards varying from state to state. Terms such as 'willful', 'wanton', 'conscious

indifference', 'reckless disregard', 'recklessness', and 'gross negligence' are put forth as the criteria for determining punitive damages in most product liability cases. Courts rarely define the meaning of such words. Yet juries are asked to pass judgment on the defendant's mental state at the time of his conduct without the support of guidelines.

In most cases juries are asked to decide in the first instance on the content of the standard to be applied and in the second instance on whether the defendant's conduct falls within that standard. Consequently, juries are given wide discretion in awarding punitive damages with little guidance. Therefore, juries are left to decide the issue of punitive damages based on their sympathies and prejudices. In product

liability actions where the defendants are corporations the problem is more acute because juries see an unlimited fund from which to draw such awards.

More importantly vague standards leave defendants uncertain as to what conduct is prohibited. Due process requires that a defendant have notice that certain types of conduct are punishable. In most product liability actions manufacturers determine only after the fact, that certain conduct will result in punishment. Therefore, the requirement of due process, that is that defendants be given adequate notice or a clear idea of the prescribed conduct, in advance, is not satisfied.

Furthermore, vague concepts such as "recklessness" or "conscious indifference" leave courts and juries room to expand the standard of liability

to include a wide range of conduct. There is nothing in the concept of "recklessness" or "conscious indifference" to limit the potential expansion. This forces product manufacturers to adhere to constantly changing standards of liability. Therefore, defendants are never certain of the standard of liability they will be held to. This is clearly a violation of the defendants' due process. Ausness, Retribution and Deterrence: The Role of Punitive Damages in Product Liability Litigation, Kent. LJ. Vol. 74, No. 1, (1985-86) pg. 57. In reality punitive damage standards are so vague as to provide the defendant with no standard at all and therefore are unconstitutional under Gioccio v. State of Pennsylvania 1382 U.S. 399, 202, 403 (1966).

In West Virginia, as elsewhere, the standard to be applied for imposing punitive damages is extremely vague. The case law is confusing, providing for a variety of interpretation and standards for imposing punitive damages.

West Virginia courts have held that punitive damages cannot be justified merely on the grounds that a defendant committed a wrongful act and is liable for compensatory damages.

Moreover, there is no effective appellate control over jury awards of punitive damages. Most appellate courts decline to review punitive damage awards because imposing punitive damages is within the discretion of the jury. In order for a reviewing court to reverse a finding by the jury on the issue of punitive damages, it must find, after viewing the evidence in the light most

favorable to the defendant, that a reasonable person could not have found that the defendant's conduct fell within the applicable standard. See, e.g., Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757,819,174 Cal. Rptr. 348,388(1981); Dorsey v. Honda Motor Co., 655 F.2d 650,655-56(5th Cir. 1981) modified 670 F.2d 21(5th Cir. 1982). Ellis, Fairness and Efficiency in The Law of Punitive Damages, So. Cal. IL Rev. Vol. 56 (Nov. 1982) 1, 39.

As the Supreme Court stated in Gertz v. Robert Welch, Inc., 418 U.S. 323,350 (1974):

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

For example, Appellate Review in Texas of punitive damage awards

protected defendants with a standard of review called the "some evidence" or "some care" test. This test permitted appellate courts to render judgment in favor of the defendants where there was evidence showing "some care" was exercised by the defendant in a punitive damage case. The courts took the position that "any" or "some care" did not rise to the standard of gross negligence which required a entire want of care. Sheffield Division. Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964).

The Texas Supreme Court, however, struck down the "some care test" in Burk Royalty Co. v. Walls, 616 S.W.2d 911 flex. 1) and the companion case of Putnam v. Missouri Valley, Inc., 616 S.W.2d 930 flex. 1981). The Court replaced the "some care test" with the

"no evidence" test. The "no evidence" test means that the Appellate Court will not review awards of punitive damages where there is the lease (sic) amount of evidence from which a jury could infer that the conduct in question could qualify under the vague standard of gross negligence or conscious indifference. The effect of this new standard is to make it easier for plaintiffs to obtain a punitive damage award in Texas. Defendants are, in reality, left without adequate appellate protection which could remedy any "unfairness" that may exist in the system.

Further due process questions are raised by the proceedings in which punitive damages are imposed. The decision-making process in which punitive damages are assessed against

defendants violate the due process clause of the Fifth Amendment. As previously discussed, punitive damage sanctions are essentially "criminal", yet defendants, in the civil arena, are not afforded the same legal protections that are required for criminal cases. Since punitive damages are awarded in a civil action plaintiffs are only required to meet and prove punitive damages by the lesser burden of proof called the preponderance of the evidence. Many legal commentators have argued that the procedure for imposing punitive damages violates the due process clause because they subject defendants to punitive sanctions similar to criminal fines without affording them the procedural and substantive safeguards which are afforded criminal defendants. These commentators suggest

that defendants in punitive damage actions be afforded the same procedural safeguards available to defendants in criminal actions. See, Ausness, Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigations, Kent I--I. Vol. 74, No. 1985-86; Ellis, Fairness and Efficiency In The Law of Punitive Damages, So. Cal. L Rev. Vol. 56, Nov. 1982 No. 1 pg. 32-33.

A federal Interagency Task Force examined the state of product liability law in the United States and drafted a Uniform Product Liability Act (hereinafter referred to as the "UPLA"). The UPLA model provision regarding punitive damages, recognized that punitive damages are in fact criminal sanctions. Therefore, the UPLA provides defendants with adequate constitutional

protections. The UPLA acknowledged that serious constitutional questions are raised when punitive damages are applied in a civil case without the benefit of the constitutional protections available under criminal law. The UPLA moved toward a criminal standard for the award of punitive damages requiring the claimant to prove by "clear and convincing" evidence that punitive damages are justified.

In addition, the UPLA provides for allowing the trier of fact to determine whether punitive damages should be awarded but requires the Court to determine the amount of those damages. This approach is in accord with the general practice of criminal law where the jury determines "guilt or innocence" and the court imposes the sentence. The UPLA, however, provides the judge with

concrete guidelines and sets forth eight factors to be considered in determining the amount of punitive damages. This is particularly important in product liability cases where, under current law, product sellers are potentially subject to repeated imposition of punitive damages for harm caused by a particular product. Many states have adopted versions of the UPLA regarding these constitution safeguards.

The present state of punitive damage law in West Virginia fails to provide juries or judges with any guidelines for imposing punitive damages, nor does it provide the defendant with the procedural safeguards required by due process. The absence of any constitutional protections for awarding punitive damages in Texas violates the

defendant's constitutional rights and recognized principals of due process.

In addition to requiring clear standards and safeguards for assessing sanctions, the due process clause also requires what is referred to as "fundamental fairness". Due process requires, in whatever context, that legal procedures be consistent with "fundamental fairness", that they be consonant with "ordinary notions of fair play and the settled rules of law", that they accord with "traditional notions of fair play and substantial justice". Lassiter v. Dept. of Soc. Serv., 452 U.S. 18,25(1981); Connally v. General Constr. Co., 269 U.S. 385, 391(1926); International Shoe Co. v. Washington 326 U.S. 310,320(1945). See Jefferies, Comment on Constitution of Punitive Damages.

There exists a "fundamental unfairness" in multiple plaintiff product liability cases where defendants face multiple punitive damage awards, excessive verdicts, vague standards of conduct, insufficient constitutional procedures and inadequate supervision or review of jury awards. These injustices are magnified in the asbestos litigation where the same defendants are also required to pay more than their fair share of the compensatory damages under the law of joint and several liability.

In Lassiter v. Dept. of Soc. Serv., the Supreme Court summarized the intent of due process and articulated guidelines to be followed in determining its application to a particular situation.

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined.

> "(unlike some legal rules]" this Court has said, due process "is not a technical concept with a fixed content unrelated to time, place and circumstances". Rather, the phrase expresses the requirement of "fundamental fairness", a requirement whose meaning can be as opaque as its importance is lofty. Applying the due process clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any precedents and then by assessing the several interests that are at stake. 452 U.S. 18,24-25(1981).

Multiple product liability cases are a recent phenomenon. Consequently, there does not exist an entire body of law in which to review for relevant precedents. The few courts that have considered the "fundamental fairness" issue in multiple product liability cases have found that the due process clause is violated by repeated awards of punitive damages. "A defendant has a due process right to be protected against unlimited multiple punishment for the same act... because

overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process." Dalkon Shield, 526 F. Supp. at 899.

The Court in Lassiter, noted that aside from considering precedents one should also "assess the several interests at stake". Id. at 24-25. There are important societal interests at stake in this litigation. This brief has noted the tremendous burden the asbestos litigation has had on the country and the judicial system. Billions of dollars have been expended to prosecute and defend these cases. Numerous companies have filed for bankruptcy and many others threaten to. The future of these manufacturing entities, which no longer produce asbestos- containing products, are in jeopardy. These defendants are

corporations that are producing products, employing persons, paying taxes and providing needed services. These are strong public policy interests that are appropriate for this court to consider in making its decision regarding punitive damage awards. As the Supreme Court aptly noted:

> Applying the due process clause is therefore a uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation... Lassiter, Id., at 24-25.

The Court here has the opportunity to correct the fundamental unfairness that exists in the asbestos litigation by dismissing the claims for punitive damages in the above-captioned cases.

V. REPETITIVE PUNITIVE DAMAGE AWARDS THROUGHOUT THE COUNTRY AMOUNT TO UNCONSTITUTIONALLY "EXCESSIVE FINES" IN VIOLATION OF THE EIGHTH AMENDMENT.

Repetitive punitive damage awards in the asbestos litigation for a single course of conduct amount to an unconstitutionally excessive fine in violation of the Eighth Amendment. The Eighth Amendment of the U.S. Constitution provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted'. Arguably punitive damages are "fines", which are imposed upon the defendant as a penalty above and beyond what is needed to compensate the plaintiff for his injuries. Punitive damages are awarded to punish the defendant. Although the penalties are paid to a private individual as opposed to the government the result to the defendant is the same. Therefore, a distinction between whether a fine is assessed by the government or

enacted by a private tort plaintiff should have no consequence.

The Supreme Court however, has suggested that the ban on cruel and unusual punishment should be limited to criminal sanctions. See Ingraham v. Wright 430 U.S. 651, 664-68(1977). The Court, however, recognized that such a limited perspective may lead to abuses. Therefore, the Court stated that certain punishment should be treated as criminal for purposes of the Eighth Amendment even though they are not explicitly so labeled. Id. at 669 n. 37. It is important to point out that a nominally civil fine can be as "excessive" as a criminal one and therefore in violation of the spirit of the Eighth Amendment.

The critical point to note is that punitive damages are in fact a form of punishment, as previously discussed. The

duplicative nature of awards of punitive damages in the asbestos litigation should be deemed excessive and therefore unconstitutional. The same defendants are consistently being punished by excessive and sometimes gratuitous awards of punitive damages which have no rational relation to the defendant's conduct which took place many years ago.

Arguably the Eighth Amendment argument is not as clearly established as the other constitutional arguments outlined here on behalf of the defendants. When, however, the Court considers that these same defendants are required to pay more than their fair share of the thousands of compensatory damages because of joint and several liability, in addition to the thousands of claims for punitive damages in this

litigation, the notion of "excessive fines" becomes much clearer.

VI. THE DEFENDANTS' DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE 3, SECTION 10 AND SECTION 17 OF THE WEST VIRGINIA CONSTITUTION ARE VIOLATED BY PERMITTING MULTIPLE PUNITIVE DAMAGE VERDICTS AND BY REQUIRING A SEPARATE LIABILITY JURY TO ASSESS A MULTIPLIER WITHOUT ALL THE EVIDENCE, WITHOUT ANY GUIDELINE AS TO WHAT A FAIR MULTIPLIER MIGHT BE.

A long shadow has been cast over the propriety of the process followed in state courts in arriving at punitive damage awards. The Supreme Court of the United States has suggested that it is ready to receive and consider Eighth Amendment claims of excessive fines and Fourteenth Amendment due process clause claims in relation to punitive damages. See Aetna Life Insurance Company v.

LaVoie, 470 So.2d 1060 (Ala. 1984); rev'd 475 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580 (1986), aff'd. conditionally, 505 So.2d 1050 (1987); Bankers Life & Casualty Company v. Crenshaw, 486 U.S ___ 100 L.Ed.2d 62,108 S.O. 1645 (1988). As previously noted, the United States Supreme Court has granted certiorari to consider the issue of punitive damages in the case of Browning-Ferris Industries of Vermont. Inc. v. Kelco Disposal, Inc., 845 F.2d 404 (2d Cir. 1988), Cert. granted, No. 88-556, 102 L.Ed.2d 559.

The United States District Court for New Jersey recently held in a memorandum opinion that the allowance of multiple punitive damage claims in the context of mass liability tort litigation violates due process. The opinion states in part as follows:

> Punitive damage awards have their deficiencies, however, some of which inhere in all such awards and some of which are unique to mass tort claims. Common to all is the fact that the amount of the fine can be excessive in respect to the conduct involved or the person or entity assessed. No limits are imposed. Certainly, no criminal statute would be tolerated which left to a judge or a jury the unfettered discretion to determine what penalty would be appropriate in any given case. No standard or uniformity exists. Different juries hearing the identical evidence as to the same defendant might award vastly different sums or none at all.

The court in a criminal matter may consider the defendant's ability to pay in determining the fine to be imposed, but no statute would be permitted which failed to set the maximum possible penalty faced by a defendant. Although the penalty imposed in a civil matter may far exceed that provided for under a criminal statute for the same conduct, none of the same safeguards are provided. The standard of proof for the

imposition of such penalties is lesser in civil matters, even though the exposure may be far greater. Privileges such as the right against self-incrimination are usually inapplicable.

Substantial punitive damage awards have the ability to financially destroy an individual, a business or a entire industry. Such insolvency may be warranted or justified because of the nature of the conduct involved, but it is an awesome power to place in the hands of a jury without limitations or guidelines.

Fines paid in criminal matters to go (sic) the public treasury. Punitive awards go to the fortuitous plaintiff. In many instances, it is a windfall.

All of the foregoing defects are exacerbated in mass tort litigation. Defendants can be held liable over and

over again for the same conduct, a result which would be barred by virtue of the right against double jeopardy in a criminal matter. Although an award in an individual case may be fair and reasonable, the cumulative effect of such awards may not be. Nor is the cumulative effect of such awards reviewable by a singles court, since the matters are permitted to proceed and be reviewed separately and independently.

Payment to individual plaintiffs rather than to a fund or class raises special problems in mass tort litigation. There is a decided risk that the earlier claimants will deplete the available assets to pay later claimants. Such a risk may east even as to compensatory damages, but it would seem inappropriate to impose repeated penalties on a company if the result is

to deny damages to subsequent claimants. If there is limited fund, priority should be given to compensating those who have been injured rather than conferring windfalls on those who have already been compensated.

Although recognizing the nature of a corporation as a continuing legal entity, the fact is that punitive damage awards, if imposed decades after the wrongful conduct, frequently punish officers who did not participate in such conduct and shareholders who did not benefit from it. Furthermore, if the successive fines serve to render companies insolvent, innocent employees and their creditors are injured as well.

It may be that the conduct of a particular defendant has been so outrageous and egregious that a jury wishes by the size of its award to

prevent that company from continuing to function. Even assuming that a jury should have the awesome power to mete out such drastic punishment, it should do so intentionally, and not inadvertently by unknowingly combining its verdict with those in the past and those yet to come.

None of the foregoing, standing alone, may be sufficient to constitute a violation of the constitutional rights of these manufacturers, but taken in combination they do infringe upon their right to due process. Opinion dated March 9, 1989, pages 2-5, Juzwin v. Amtorg Trading Corp., No. 87-3876 (D.N). March 9, 1989).

For all the reasons set forth in Juzwin punitive damages must only be considered by a jury under the maximum constitutional protections. The

constitutional protections must include a clear standard for the award of punitive damages; guidelines as to all relevant evidence, all defenses, and the appropriate burden of proof; requirements for a foundation in actual damages with an appropriate relationship to the harm caused and actual damages; and finally, limitations to avoid individual and cumulative excess wards, repetitious trials and verdicts.

In Muzelak v. King Chevrolet. Inc., 368 S.E.2d 710 (W. Va. 1988) this Court observed that punitive damages should not be reduced unless they seem monstrous. This standard is very similar to the standard followed in Vermont and at issue in the Browning-Ferris appeal. Having taken the "reasonable relationship" lid off punitive damage awards and having left the determination

of punitive damages to an inherently subjective jury process, West Virginia has invited a constitutional attack on its approach to the determination of punitive damages.

A punitive damage award under West Virginia case law as cited infra is indistinguishable form an assessment of a criminal line. In criminal cases, the state is required to clearly articulate its basis for punishment. Failure to do so violates a defendant's due process. The same failure may be unconstitutional in a civil case. As Justice O'Connor wrote in her concurring opinion in Bankers Life & Casualty Company v. Crenshaw, 100 L.Ed.2d at 78:

> Appellate has touched on a due process issue that I think is worthy of the Court's attention... Mississippi Law gives juries discretion to award any amount of punitive damages in any tort case in

> which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this my violate the Due Process Clause.

Justice O'Connor seeks a close scrutiny of the procedures that surround a punitive damages award. That scrutiny may well come in the case of Browning-Ferris Industries of Vermont. Inc., et al. v. Kelco Disposal. Inc., No. 88-556, in which the United States Supreme Court granted certiorari to consider a punitive damage verdict rendered in Federal District Court in Vermont. The case is scheduled for argument in April, 1989.

VII. CONCLUSION

The tort system is designed to compensate persons injured through the

fault of another: Punitive damages, on the other hand, have little to do with compensating injured victims but rather are designed to punish and deter actions which are deemed socially undesirable. Whereas, in the context of the asbestos litigation, the motivating policies behind punitive damages are not achieved, it is inappropriate to permit their award. This is especially so since allowing them may ultimately result in a deprivation of compensation to future claimants.

Pittsburgh Corning Corporation has had a punitive damage verdict rendered against it in an asbestos case in the Carper case in the Circuit Court of Kanawha County, West Virginia. This verdict has been satisfied.

Fibreboard Corporation recently had punitive damages awarded against it in

Monongalia County. Jennings Davis v. OCF. et al. This verdict is under appeal.

A punitive damage verdict has been rendered against Pittsburgh Corning Corporation and Fibreboard Corporation in Phase I of a consolidated "Mass Liability" trial involving 315 cases in the Circuit Court of Kanawha County, West Virginia in Denver Turley. et al. v. Owens-Corning Fiberglas. et al., Civil Action No. 84-C-3321 [In Re: Asbestos Cases].

OWENS-ILLINOIS, INC.
PITTSBURGH CORNING CORPORATION
FIBREBOARD CORPORATION AND
KEENE CORPORATION

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